

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

**UNITED STATES OF AMERICA )**

**ex rel. Armando Becerrill )**

**Petitioner, )**

**v. )**

**Case No. 00 C 3450**

**JERRY L. STERNES )**

**Respondent. )**

**MEMORANDUM OPINION AND ORDER**

MATTHEW F. KENNELLY, District Judge:

Armando Becerrill petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254. His petition is denied, as his arguments are either non-cognizable, procedurally defaulted, or lacking in merit.

**FACTS**

The evidence at Becerrill's trial showed that on May 15, 1992, he was a passenger in a Honda Accord heading east through Illinois on Interstate-80. The car was stopped by a police officer for traveling at 51 miles per hour in a construction zone with a speed limit of 45 miles per hour. App. Op. at 2.<sup>1</sup> While pulling the car over, the police officer noticed the passenger reaching under the seat and adjusting his cap. After coming to a stop on the shoulder, the driver gave the officer identification showing that he was Jose

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<sup>1</sup> The state courts' factual determinations "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). This presumption can be rebutted by the presentation of "clear and convincing evidence" by the petitioner. *Id.*

Salazar and registration documents indicating that Curtis Lee Sessa of Tustin, California owned the car. The officer smelled a heavy odor of air freshener in the car and noticed that no luggage was visible. *Id.* at 3. The officer separated the two and questioned them. Salazar told the officer that he and Becerrill were traveling from California to New York; Becerrill stated that they were going to Chicago. Salazar walked with the officer to the officer's squad car to receive a warning ticket for the speeding violation. Salazar told the officer that he had been visiting with Becerrill in California for fifteen days and that they were now on their way to New York, where Becerrill would spend two weeks and then return to California alone in the Honda. The officer asked whether there were any guns or narcotics in the car. According to the officer, Salazar "replied that there should not be and asked [the officer] if he'd like to search the car." *Id.* Salazar read and signed a consent to search form while the officer called for backup.

After placing Salazar in his squad car, the officer approached the Honda. Becerrill was still sitting in it. The officer ordered Becerrill to stay in the car while he pulled the keys out of the ignition and opened the trunk of the car. Another officer arrived and ordered Becerrill out of the car while the search progressed. While Becerrill stood watching the search, he "repeatedly reached up toward his hat and had to be told to keep his hands at his sides." *Id.* at 4.

The trunk contained several bags of men's clothing and a large number of rolled up fifty-dollar bills. The officer also noticed that the trunk appeared to have no well for a spare tire. Another officer arrived with Thor, a dog trained to detect the presence of narcotics. Thor reacted positively at the rear of the car. Two of the officers checked under the car and found fresh undercoating, and they could see packages through a small hole in the underbody. Concluding that the car probably had a hidden compartment, an officer used a small, cordless drill to reach the space where the packages were located. White powder

that field-tested as cocaine fell from the hole and covered the drill bit.

Becerrill and Salazar were arrested. Underneath Becerrill's cap, the officer's found a loaded .38 caliber semi-automatic pistol. After taking the defendants into custody, the officers cracked open the secret compartment and found another pistol, ammunition, and 45 kilograms of cocaine. *Id.* at 5. The car did not contain tools which could have been used to access the hidden compartment. Fingerprints were lifted from the packages of cocaine, but they did not match either Becerrill or Salazar. *Id.*

Three days later, the State charged Becerrill and Salazar with armed violence, unlawful possession of a controlled substance with intent to deliver, and controlled substance trafficking. *Id.* at 2. Becerrill moved for a severance from Salazar; the motion was granted. He moved to quash his arrest and to suppress the evidence the police had seized; the motion was denied. At trial, the prosecution presented the evidence summarized above, including the police officer's testimony about Salazar's statements made after the traffic stop. Becerrill was convicted by a jury on all counts. Before sentencing, Becerrill filed a motion for a new trial based on newly discovered evidence regarding Salazar's involvement in the case, specifically that Salazar had bought both of the guns, had been seen in California driving the car, and had extensive contacts with drug traffickers. This motion was denied and Becerrill was sentenced to concurrent sentences of 30 years for armed violence, 40 years for possession with intent to deliver, and 40 years for trafficking. Becerrill was also fined \$10 million and ordered to pay costs and fees.

Becerrill appealed his conviction. It was affirmed by Illinois Appellate Court, Third District, on May 27, 1994. His petition for leave to appeal was denied by the Illinois Supreme Court on October 6, 1994. Becerrill moved *pro se* to vacate the judgment on March 6, 1996, claiming that the La Salle County State's Attorneys Office had knowingly withheld information from him, specifically Salazar's connection

in California with the guns and the Honda. After Becerrill converted his motion to vacate into a petition for post-conviction relief, the trial court dismissed it as untimely. This order was affirmed on May 27, 1999 in an unpublished opinion of the Appellate Court. Becerrill's petition for leave to appeal to the Illinois Supreme Court was denied on October 6, 1999. He filed this habeas corpus petition on June 6, 2000.

## **DISCUSSION**

Becerrill's *pro se* habeas corpus petition consists of the form provided by the Clerk for prisoners. He states that he is raising the same issues raised in the briefs attached to the petition: the reply brief filed in his direct appeal and the main brief filed in the appeal from the denial of his petition for post-conviction relief. Those briefs raise seven claims. His direct appeal asserted that his trial was deficient because of (1) insufficient evidence, (2) the erroneous introduction of his co-defendant's hearsay statement, (3) newly discovered evidence, (4) the wrongful denial of his motion to suppress, and (5) erroneous jury instructions on armed violence. His post-conviction brief asserted that the circuit court's dismissal of his post-conviction appeal as untimely was erroneous because (6) his late filing was not due to his culpable negligence and (7) his cause could proceed under Section 2-1401 of the Illinois Code of Civil Procedure, governing motions to vacate judgment.

The State concedes that Becerrill has exhausted his state remedies, a prerequisite to this Court's review of his claim. 28 U.S.C. § 2254(b)(1)(A) & (c). It responded to Becerrill's first three claims on the merits and attacked the remaining four claims as either procedurally defaulted or not cognizable in this Court.

### *Claims Barred from Review*

Becerrill's fourth claim is that his Fourth Amendment rights were violated; he argues that Salazar's

consent to search did not include consent to drill holes in the car. This Fourth Amendment argument, regardless of its merit, cannot be taken up by this Court unless a full and fair opportunity to litigate those claims in state court proceedings was denied. *See Stone v. Powell*, 428 U.S. 465, 483 (1976); *Withrow v. Williams*, 507 U.S. 680, 686 (1993). If Becerrill clearly informed the state court of the factual basis for his claim and argued that those facts constitute a violation of Fourth Amendment rights, and if we find that “the state court has carefully and thoroughly analyzed the facts and . . . applied the proper constitutional case law to the facts,” *Turentine v. Miller*, 80 F.3d 222, 224 (7th Cir. 1996), he can not obtain habeas relief from this court.

Before trial and on appeal, Becerrill presented his Fourth Amendment arguments to the state courts. Those courts analyzed the facts and applied the proper legal standards; that is “what the typical reasonable person would have understood his consent to entail.” App. Op. at 10 (citing *Illinois v. Spiegel*, 233 Ill. App. 3d 490, 493-94, 599 N.E.2d 191, 194 (1992), which followed *Florida v. Jimeno*, 500 U.S. 248 (1991)). Regardless of whether this Court agrees or disagrees with the state courts’ conclusion regarding the scope of Salazar’s consent to search, *Stone v. Powell* tells us that Becerrill’s challenge to that conclusion cannot be the basis for federal habeas corpus relief.

Becerrill’s fifth claim is that the jury was erroneously instructed on armed violence. The State argues that this claim is procedurally defaulted, as the appellate court rejected this argument as waived. The Court agrees. Becerrill has not made a showing of cause sufficient to overcome this default, and in any event the applicability of the Illinois offense of armed violence in this context is a matter of state law that does not appear to present any issue of constitutional dimensions.

The State argues that Becerrill’s sixth and seventh claims are not cognizable, as they assert errors

in the post-conviction relief process that are not constitutional in nature. In these claims, Becerrill argued that his claim for post-conviction relief should not have been dismissed as untimely, given that the delay was not due to his culpable negligence; and that his cause of action could proceed as a motion to vacate judgment. Habeas proceedings are intended to “to determine whether a person is being confined in violation of basic norms of legality.” *Allen v. Duckworth*, 6 F.3d 458, 460 (7th Cir. 1993). Becerrill has no Federal Constitutional right to post-conviction relief, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), so alleging procedural errors in state post-conviction proceedings fails to present claims for which Becerrill is entitled to relief. *See also Jackson v. Duckworth*, 112 F.3d 878, 880 (7th Cir.), *cert. denied*, 522 U.S. 955 (1997).

#### *Claims Properly Presented for Review*

Relief will be available on Becerrill’s remaining claims only if the Illinois courts’ adjudication of them “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court.” 28 U.S.C. § 2254(d)(1). Under this standard, habeas corpus relief (if warranted) is available under two different standards: (a) if the state court’s decision is contrary to precedent, or (b) if the state court’s decision is an unreasonable application of precedent. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court held that a state court decision is contrary to the Supreme Court’s precedent if it “applies a rule that contradicts the governing law set forth in our cases,” *id.* at 405, or if it “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Id.* at 406. Under the second standard, a state court unreasonably applies clearly established law if the state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.”

*Id.* at 406-07. The inquiry for this Court is simply “whether the state court's application of clearly established federal law was objectively unreasonable” not whether it was subjectively unreasonable. *Id.* at 409-10.

Becerrill’s first claim is that he was convicted with insufficient evidence; he argues that the prosecution did not prove the essential elements of knowledge and possession. The constitutional standard for sufficiency of the evidence is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Knowledge of the drugs’ presence is an element of both possession with intent to deliver and trafficking, Ill. Rev. Stat. 1991, ch. 56½, pars. 1401(a)(2)(D), and possession is an added element of the possession with intent to deliver count. Ill. Rev. Stat. 1991, ch. 56½, pars. 1401(a)(2)(D). The appellate court applied the proper legal standard to Becerrill’s claim. App. Op. at 5. It noted that knowledge is often “inferred from the surrounding circumstances,” while possession “may be inferred if the defendant had exclusive control over the premises where the controlled substance was found.” *Id.* at 6. Control can be exclusive even though it is joint. *Id.* at 6-7.

Becerrill highlights the facts that his fingerprints were not found on the packages, that police did not find any special tools in the car for accessing the secret compartment, that he did not own the car or have a key, and that he never made any inculpatory statements. Not surprisingly, the State directs our attention to the loaded handgun that Becerrill concealed on his person during the traffic stop. The appellate court cited Becerrill’s presence in the car with a very large amount of cocaine, the conflicting stories given by Becerrill and Salazar, Becerrill’s possession of a gun, and his “furtive” movements toward where the gun was hidden. The court found that the jury reasonably could have concluded that Becerrill “must have

known about the cocaine and indeed was responsible for safely transporting this highly valuable cargo.”  
*Id.* at 8.

The appellate court reasonably applied the governing legal standard in Becerrill’s case. A rational jury could have found Becerrill knew of and had possession of the cocaine in the car’s secret compartment. Although it is possible that Becerrill was simply along for the ride and possessed the weapon for his own protection, the jury was entitled to reject that explanation.

Becerrill’s second claim is that the admission of Salazar’s statements violated Becerrill’s rights under the Confrontation Clause of the Sixth Amendment as well as his right to a fair trial. The trial judge excluded some of Salazar’s statements to the police: his statements that Becerrill lived with Salazar’s cousin in California, that the cousin owned the car, and that the cousin had loaned it to both of them jointly, as well as his claims that the car had no drugs or weapons in it and that he did not know how to access the secret compartment. However, the court allowed the arresting officer to testify that Salazar said that he had been visiting with Becerrill in California for fifteen days and that they were now on their way to New York, where Becerrill would spend two weeks and then return to California alone in the Honda.

Admitting the confessions or arrest statements of a non-testifying codefendant is error, *Bruton v. United States*, 391 U.S. 123 (1968), but an exception exists for statements admissible as co-conspirator declarations. In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that the standard for admissibility of co-conspirator declarations under the Confrontation Clause is the same as the standard under Federal Rule of Evidence 801(d)(2)(E). Accordingly, Rule 801(d)(2)(E), and the relevant case law, are helpful guides in assessing a state court’s admission of codefendant statements. *See, e.g., Garlington v. O’Leary*, 879 F.2d 277, 280 (7th Cir. 1989) (“If the Illinois ruling would have satisfied

Fed.R.Evid. 801(d)(2)(E), it will also satisfy the constitutional requirement.”).

In order for Salazar’s statements to qualify as co-conspirator declarations, the State had to show by a preponderance of the evidence that a conspiracy existed; that Becerrill and Salazar were members of the conspiracy at the time the declaration was made; and that the statement was made in the course of and in furtherance of the conspiracy. *See United States v. Santiago*, 582 F.2d 1128, 1135 (7th Cir. 1978), *overruled on other grounds by Bourjaily*, 483 U.S. 171 (1987). The requirement that coconspirator statements be made in furtherance of the conspiracy “is a *limitation* on the admissibility of coconspirators’ statements that is meant to be taken seriously.” *Garlington*, 879 F.2d at 283 (emphasis in original). Statements are in furtherance of the conspiracy when they are part of “the information flow between conspirators intended to help each perform his role,” *United States v. Van Daal Wyk*, 840 F.2d 494, 499 (7th Cir. 1988). But statements inculcating other conspirators knowingly made to law enforcement agents do not meet the in furtherance requirement. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE §427 (2d ed. 1994).

Contrary to the appellate court’s ruling, Salazar’s statements to the police officer were not made in furtherance of the conspiracy. They were statements that Salazar made to a police officer which tended to exculpate Salazar at the expense of Becerrill. Although the appellate court held that Salazar’s statements were not inculpatory or exculpatory and were designed to secure the safe transportation of the cocaine, that rationale does not explain how Salazar’s statement to the police could possibly be in furtherance of the conspiracy to transport cocaine. That statement tended to show that Becerrill had a greater connection to the car than Salazar.

The Supreme Court noted in *Lee v. Illinois* that “the arrest statements of a codefendant have

traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." 476 U.S. 530, 541 (1986) (quoting *Bruton v. United States*, 391 U.S. 123, 141 (White, J., dissenting)). Such statements are inadmissible under *Bruton*.

Even though Becerrill's confrontation right was violated, this Court cannot grant habeas corpus relief unless it is plain that Salazar's statements had substantial effect or influence on the jury. Under the standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), a constitutional trial error requires reversal only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776. "[H]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Becerrill has not done so. Though the evidence, without Salazar's statements to the officer, was not overwhelming, it amply supported Becerrill's conviction. Becerrill was traveling cross-country in a car with a compartment full of cocaine, concealed a handgun, and gave a conflicting story to Salazar's about their destination. Salazar's statement to the police may have tightened somewhat Becerrill's connection to the car, but in the overall scheme of things we do not believe it had a substantial effect on the verdict; Becerrill would have been convicted even without the improper evidence.

Becerrill asserts as his third claim that the trial judge erred in denying his motion for a new trial based on newly discovered evidence, specifically that Salazar had purchased both the guns under a false name and had been seen driving the car in California. Habeas relief will be available for new information if "there is a reasonable probability that this information would have altered the outcome of the trial."

*Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3647 (Mar 29, 2001). *See also Strickler v. Greene*, 527 U.S. 263, 280 (1999). The question is “not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 289-90 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The appellate court noted correctly that the key issue in Becerrill’s case was possession of the gun, not ownership. App. Op. at 16. Salazar’s purchase of the guns was therefore immaterial. And the fact that Salazar had been seen driving the Honda in California does nothing to undermine the jury’s finding that Becerrill knew about the drugs and the weapons.

### CONCLUSION

Becerrill’s petition for writ of habeas corpus is denied. The Clerk is directed to enter judgment in favor of the respondent. However, we grant Becerrill a certificate of appealability under 28 U.S.C. §2253(c)(2) and Fed. R. App. P. 22(b) on the issue of the admission of codefendant Salazar’s statements to the police, because Becerrill has made a “substantial showing of the denial of a constitutional right” with regard to that claim.

Dated: May 8, 2001

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MATTHEW F. KENNELLY  
United States District Judge